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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CARLOS SANCHEZ-BARAJAS, Defendant and Appellant.	H033091 (Santa Clara County Super. Ct. No. CC598695)

Defendant Carlos Sanchez-Barajas submitted his case to the trial court, pursuant to *Bunnell v. Superior Court* (1975) 13 Cal.3d 592 (*Bunnell*), on the condition that, if convicted, he would not be sentenced to state prison. The court found defendant guilty of inflicting pain or suffering on a child (Pen. Code, § 273a, subd. (a)),[1] and found true the special allegation that defendant personally inflicted great bodily injury upon a child under the age of five years (§§ 12022.7, subd. (d), 1203, subd. (e)(3)). The court suspended imposition of sentence and placed defendant on probation for four years with various terms and conditions, including that he serve one year in county jail.

On appeal, defendant contends that his jury trial waiver and *Bunnell* submission were coerced by a promise of significant benefits by the trial court which were not part of

[1] All further statutory references are to the Penal Code.

a plea bargain, thereby requiring reversal. We find that defendant's jury trial waiver and *Bunnell* submission were valid and, therefore, will affirm the judgment.

BACKGROUND

The following facts underlying defendant's conviction are quoted from the probation officer's report, and are derived from the police report and the transcript of the preliminary examination. "On April 18, 2005, the San Jose Police Department received a report from Child Protective Services indicating the victim John Doe, age four months who is the defendant's child, was being treated at Valley Medical Center for injuries consistent with shaken baby syndrome. [¶] During an interview with the defendant, he stated he was taking care of the child throughout the day and the baby was under his supervision the whole time. The baby never fell and nothing traumatic happened throughout the day that could have caused the injuries to the child. [¶] During an interview with the child's mother, . . . she indicated that [when] she left for work at approximately 6:00 a.m. the baby was asleep in the basinet. She indicated that she called home at approximately 9:00 a.m. and the defendant told her that the baby had woken up around 7:00 a.m. and was crying and screaming. [¶] On July 27, 2005, the defendant was arrested and booked into County jail. [¶] . . . [¶] During the preliminary examination which occurred approximately one year after the present offense [the child's mother] indicated she was taking the victim to the hospital for therapy three times a week. The baby at 18 months old could not sit up by himself, walk, talk, or eat without the help of someone else, and could not grab anything with his hands."

Defendant was charged by information filed July 21, 2006, with one count of inflicting pain or suffering on a child (§ 273a, subd. (a)). The information further alleged that defendant personally inflicted great bodily injury upon a child under the age of five years (§§ 12022.7, subd. (d), 1203, subd. (e)(3)).

On January 14, 2008, defendant appeared with appointed counsel and submitted the matter to the trial court as follows.

"THE COURT: My understanding is that the defendant is prepared to submit the issue of guilt or innocence and truth of any enhancements by way of a *Bunnell* submission with the understanding that if the court finds the defendant guilty, the defendant would not be sentenced to state prison, it would be CNSP [condition no state prison], and that, further, counsel would have an opportunity at the time of sentencing to bring a motion for domestic diversion or dependent diversion that's done in dependency department.

"[DEFENSE COUNSEL]: Child abuse diversion.

"THE COURT: Did I correctly state everything?

"[DEFENSE COUNSEL]: Yes, Your Honor. These are the documents that I would ask the court to review.

"THE COURT: Again. I've asked counsel to agree on which documents the court should review for the *Bunnell* submission. [¶] If you'd identify those for the clerk, please."

After defense counsel identified the documents, the following occurred.

"THE COURT: Okay. [¶] [Prosecutor], you agree that those are the documents that the court may review on the *Bunnell* submission?

"[THE PROSECUTOR]: Yes.

"THE COURT: Mr. Sanchez –

"[THE PROSECUTOR]: May I note for the record the court has made this CNSP offer?

"THE COURT: That's correct. [¶] And Mr. Sanchez-Bar – [¶] First of all, counsel, you've discussed with him the elements of the offense, possible defenses and consequences of the *Bunnell* submission, and you're satisfied with those discussions, waiver of rights and *Bunnell* submission?

"[DEFENSE COUNSEL]: I am, Your Honor.

"THE COURT: And Mr. Sanchez-Barajas, you're likewise satisfied with those discussions with your attorney?

"THE DEFENDANT: Yes.

"THE COURT: You do have the right to a court or jury trial on the question of your guilt or innocence and the truth of any enhancements. When you submit the matter on the documents, which is known as a *Bunnell* submission that means that you agree that the court can decide the question of your guilt or innocence based on a reading of the documents that counsel have agreed to. [¶] Do you understand that?

"THE DEFENDANT: Yes, I understand.

"THE COURT: Do you give up your right to a court or jury trial?

"THE DEFENDANT: Yes.

"THE COURT: You understand that in most cases where the matter is submitted in this fashion that the defendant is found guilty but that counsel have agreed that if you are found guilty, you will not be sent to state prison and your attorney at sentencing will be able to bring a motion for child abuse diversion? [¶] Do you understand that?

"THE DEFENDANT: I understand."

The court then asked defendant if he was under the influence of any drug, alcohol, or narcotic that would interfere with his ability to understand the proceedings; if anyone had threatened him or anyone close to him in order to coerce him into submitting the matter; and if anyone made any promises about his case other than what was stated on the record to induce him to do what he was doing. Defendant answered "no" to each of these questions. The court also asked defendant if he was submitting the matter freely and voluntarily; if he understood and gave up his right to confront and cross-examine the witnesses against him; if he understood and gave up his rights to present evidence and witnesses, and to testify, on his own behalf; and if he understood and gave up his right against self-incrimination. Defendant answered "yes" to each of these questions.

"THE COURT: Maximum term on Mr. Sanchez-Barajas is?

"[THE PROSECUTOR]: Twelve years.

"THE COURT: Sir, you understand that in this matter you're pleading to count one – you're not pleading. You're submitting it. If I find you guilty, you would be placed on felony probation for up to five years on terms and conditions related to the charges, one of which could be that you serve up to one year in county jail. Your attorney will bring a motion at the time of sentencing to receive domestic violence – strike that – child abuse diversion. [¶] Do you understand that?

"THE DEFENDANT: Yes, I understand.

"THE COURT: If you fail the diversion program – [¶] Is this probation ineligible?

"[THE PROSECUTOR]: No.

"THE COURT: You could be placed on felony probation for up to five years on terms and conditions related to these charges, one of which could be that you serve up to one year in the county jail. And if you thereafter violated that probation, you could be sent to state prison for up to 12 years, released on parole for up to three years and returned to prison one year for each violation. [¶] Do you understand that?

"THE DEFENDANT: Yes, I understand.

"THE COURT: And the term of probation in this case must be, if I give you probation, four years. [¶] Do you understand that?

"THE DEFENDANT: I understand. [¶] . . . [¶]

"THE COURT: And finally, Mr. Sanchez-Barajas, if the court were to give you diversion and you were – instead placed you on probation, the charge does require a one-year program. [¶] Do you understand that?

"THE DEFENDANT: Yes.

"THE COURT: All right. First of all, [prosecutor], anything further of Mr. Sanchez-Barajas?

"[THE PROSECUTOR]: No.

"[DEFENSE COUNSEL]: No, Your Honor. Thank you. [¶] . . . [¶]

"THE COURT: . . . I'll find a knowing, voluntary, intelligent waiver of constitutional rights. [¶] Mr. Sanchez-Barajas, at this time, having given up all of those rights, you do consent to submit this matter to the court for determination of your guilt or innocence, the truth of the enhancements on the preliminary hearing transcript, the police report, the transcript of both your and your wife's testimony – or statements to police, transcript of the 911 tape and the stipulation – [¶] And the stipulation was involving?

"[DEFENSE COUNSEL]: Statement of Dr. Joyce Li . . . .

"THE COURT: All right. At this time, sir, you consent to that?

"THE DEFENDANT: Yes.

"THE COURT: All right. People waive jury.

"[THE PROSECUTOR]: Yes.

"THE COURT: All right. I'll accept that. And the matter will be taken under submission for decision."

At the hearing on March 7, 2008, the court stated: "[T]his matter was previously submitted by the defendant and counsel to the court as a *Bunnell* submission. . . . [¶] Either counsel have anything to put on the record before the court makes its finding in this matter?" Defense counsel responded: "Your Honor, based on the court offer that the court extended to my client and further based on further investigation that I did in this matter, it was Mr. Barajas'[s] decision that he would submit the matter pursuant to *People* [*v.*] *Bunnell* [*sic*]." The court then stated it found defendant guilty of violating section 273a, subdivision (a), and further found that he personally inflicted great bodily injury on a child under the age of five, within the meaning of sections 12022.7, subdivision (d), and 1203, subdivision (e)(3). It ordered a probation report and set the matter for sentencing.

On May 29, 2008, defendant's appointed counsel filed a request for diversion under section 1000.12, subdivision (b).[2] The probation officer's report recommended that imposition of sentence be suspended and that defendant be placed on formal probation with various terms and conditions, including a "Maximum County Jail" term. On June 19, 2008, the date set for sentencing, defendant's appointed counsel requested that the matter be continued two weeks "for [retained counsel] to review the matter and bring a motion to withdraw the plea." The prosecutor stated, "I think I would not oppose a motion to withdraw a plea."

The court ruled as follows: "In this matter, counsel, Mr. Sanchez-Barajas, this case has been discussed at length. Mr. Sanchez-Barajas, when you submitted this matter to the court for decision on the *Bunnell* submission, after lengthy discussion, I asked you a number of questions. . . . I advised you that if you submitted this matter pursuant to *People* [*v.*] *Bunnell* [*sic*], that in all likelihood you would be found guilty because that's what happens in these kinds of cases. You acknowledged that. I went over each of the rights that you had in this case and you acknowledged that you understood and gave up each of those. [¶] You apparently are now having buyer's remorse, and that is not a reason to withdraw the plea. There's no issue here about the effectiveness of counsel. There's no issue about the plea that was taken in this case. It appears that, unless you want to tell me something different, that you just now have buyer's remorse and want to try again, and we don't – that's not the way our system works. [¶] [The prosecutor] doesn't mind if you withdraw your plea because now he wants, I think, maybe thinks that you ought to go to prison, and under the arrangement that your attorney, and [the

[2] "In lieu of prosecuting a person suspected of committing any crime, involving a minor victim, or an act of physical abuse or neglect, the prosecuting attorney may refer that person to the county department in charge of public social services or the probation department for counseling or psychological treatment and such other services as the department deems necessary. . . ." (§ 1000.12, subd. (b).)

prosecutor] and I entered into, you can't be sent to state prison today at the outset of the case. You either get diversion, or you get a county jail sentence or some probationary sentence. [¶] So I'm going to deny the request for the continuance."

Defendant then requested, and the court held, a *Marsden* hearing. (*People v. Marsden* (1970) 2 Cal.3d 118.) After hearing from defendant and his appointed counsel, the court denied the *Marsden* motion and separately found "that there was no showing of any necessity to continue the matter for a motion to withdraw a plea." Defendant's counsel argued that this case was an appropriate case for diversion under section 1000.12, and the prosecutor and the probation officer argued that it was not. The prosecutor stated that he "was mistaken in entering this very favorable to the defendant plea arrangement" and that he "did so under the mistaken belief that the victim's mother did not wish to see [defendant] punished." After the prosecutor agreed to the *Bunnell* submission, he learned that the baby's mother and defendant have become estranged and that the mother does want to see defendant punished. The court denied defendant's request for diversion.

Defendant's counsel asked the court to grant defendant probation, and to sentence him to those days in custody that he had already served. The prosecutor argued for "the maximum county jail sentence." The court suspended imposition of sentence and placed defendant on probation for four years with various terms and conditions, including that defendant serve a one-year county jail term and that he complete the certified child abuser's treatment program under section 273.1. Defendant accepted probation on the terms and conditions imposed. He filed a timely notice of appeal and an amended notice of appeal.

DISCUSSION

Defendant contends that the trial court "essentially enter[ed] into a sentence bargain with [defendant], rendering the consequent waiver of both jury trial and trial rights in the *Bunnell* submission involuntary under [*People v.*] *Collins* [(2001) 26 Cal.4th 297 (*Collins*)]. Admittedly, the record in the present case is something less than a

paragon of clarity as to whether it was the court or the prosecutor who promised benefits to [defendant] in exchange for his agreement to waive jury and subject himself to a *Bunnell* submission court trial. However, . . . a careful reading of the record demonstrates with some clarity that this was the result of a court offer to which the prosecutor never assented, and thus improper under *Collins*. [¶] It is further clear, . . . that this benefit was promised in exchange for an agreement to jury waiver in connection with the *Bunnell* submission, and thus the plea process cannot be characterized as a 'indicated sentence' by the court. [¶] It follows under *Collins* that reversal is compelled in the present case because this is structural error stemming from a coerced jury waiver by [defendant]."

The Attorney General contends that defendant's "waiver of his right to a jury trial and his *Bunnell* submission were made 'voluntarily and intelligent[ly] under the totality of the circumstances.' Although the trial court initially stated one condition of the jury trial waiver and *Bunnell* plea submission was that [defendant] would not receive a state prison sentence, that condition was accepted by the prosecutor and became a definitive term of the plea agreement. Any error in the trial court interjecting the no state prison condition was remedied by the circumstances surrounding the agreement: the prosecutor acknowledged and accepted the defined benefit that [defendant] would not be subjected to a state prison sentence."

In *People v. Orin* (1975) 13 Cal.3d 937 (*Orin*), our Supreme Court explained: "The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.] Pursuant to this procedure the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he [or she] were convicted of all offenses charged. [Citation.] This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of

such clement punishment [citation], by the People's acceptance of a plea to a lesser offense than that charged, either in degree [citation] or kind [citation], or by the prosecutor's dismissal of one or more counts of a multi-count indictment or information. Judicial approval is an essential condition precedent to the effectiveness of the 'bargain' worked out by the defense and prosecution. [Citations.] But implicit in all of this is a process of 'bargaining' between the adverse parties to the case—the People represented by the prosecutor on one side, the defendant represented by his [or her] counsel on the other—which bargaining results in an agreement between them. [Citation.]" (*Id.* at pp. 942-943.)

"However, the court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of 'plea bargaining' to 'agree' to a disposition of the case over prosecutorial objection." (*Orin, supra,* 13 Cal.3d at p. 943.) The trial court may, however, give an "indicated sentence." (*People v. Allan* (1996) 49 Cal.App.4th 1507, 1516.) "In an indicated sentence, a defendant admits all charges, including any special allegations and the trial court informs the defendant what sentence will be imposed. No 'bargaining' is involved because no charges are reduced. [Citations.] In contrast to plea bargains, no prosecutorial consent is required. [Citation.]" (*Ibid.*)

In *Bunnell, supra,* 13 Cal.3d 592, the court held that a stipulation to submit a case for decision on the preliminary examination transcripts, with or without other documents, is " 'tantamount to a plea of guilty.' " (*Id.* at p. 605.) The consequence of this is that the trial court is required to advise the defendant of his constitutional rights to a jury trial, silence, and confrontation; to secure the defendant's express waivers of those rights; and to advise the defendant of the probability that the submission will result in a conviction of the offense charged. (*Ibid.*)

In *Collins, supra,* 26 Cal.4th 297, the court discussed the circumstances under which a waiver of jury trial could be considered invalid. In that case, on the day set for

jury trial, the defendant's counsel informed the trial court that he had discussed with the defendant the possibility of his waiving a jury trial. The court asked the defendant if he wished to waive jury trial and the defendant stated that he wished to " 'waive.' " (*Id*. at p. 301.) The court then proceeded to advise the defendant of his right to jury trial and to explain what he would be giving up if he chose to go to trial before the court. The defendant indicated he understood his rights and still intended to waive jury trial. When the court asked the defendant if he understood that he was not " 'gaining any promises of leniency or anything else relative to the waiver,' " defendant responded negatively. (*Id*. at p. 302.) The defendant informed the court that he was told the waiver of jury trial " '*was some reassurance or some type of benefit*.' " (*Ibid*.) The court told defendant that it had informed defendant's counsel that the waiver might well be tied to a benefit, because it would not then take up two weeks of the court's time to try the case. The court would not specify the exact nature of the benefit, but indicated that by waiving a jury the defendant was getting some benefit. The defendant replied that he understood and waived his right to jury trial. (*Id*. at pp. 302-303.)

The *Collins* court held that "the waiver of a jury trial obtained by a trial court's assurance of an unspecified benefit is not a valid waiver, and that this error compels reversal of [the] defendant's conviction." (*Collins, supra*, 26 Cal.4th at p. 300.) The court noted that it had long been recognized by the United States Supreme Court that "the state may not punish a defendant for the exercise of a constitutional right, or promise leniency to a defendant for refraining from the exercise of that right." (*Id*. at p. 306.) It then reasoned, "the trial court, upon informing [the] defendant that he would receive a benefit of an unspecified nature in the event he waived his right to trial by jury, secured [the] defendant's response that he understood. The court made these representations and offers to [the] defendant prior to determining that his waiver of the right to jury trial was knowing, intelligent, and voluntary. The form of the trial court's negotiation with [the] defendant presented a 'substantial danger of unintentional coercion.' [Citation.] [¶] In

addition, the objective of the trial court's comments was to obtain [the] defendant's waiver of a fundamental constitutional right that, by itself (when defendant elects to go to trial), is not subject to negotiation by the court. In effect, the trial court offered to reward [the] defendant for refraining from the exercise of a constitutional right. [Citations.] The circumstance that the trial court did not specify the nature of the benefit by making a promise of a particular mitigation in sentence, or other reward, does not negate the coercive effect of the court's assurances. The inducement offered by the trial court to [the] defendant, to persuade him to waive his fundamental right to a jury trial, violated [the] defendant's right to due process of law." (*Id*. at p. 309, fn. omitted.)

However, the *Collins* court noted that benefits that are offered to a defendant by a prosecutor in the course of plea negotiations, in which constitutional rights are relinquished, do not necessarily render the waiver of those constitutional rights involuntary or otherwise unconstitutional. "We do not intend by our holding today to call into question the well-established practice in which the *prosecutor* and the defendant negotiate a plea of guilty or nolo contendre [citation], a practice that obviously involves a relinquishment of the constitutional rights attending a trial, including the right to trial by jury. As the high court has explained in examining the prerogative of the state, through the prosecutor, to offer such a plea: '[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right is invalid. Specifically, there is no *per se* rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea,' which may obtain for the defendant ' "the possibility or certainty . . . [not only of] a lesser penalty than the sentence that *could* be imposed after a trial and a verdict of guilty . . ." [citation], but also of a lesser penalty than that *required* to be imposed after a guilty verdict by a jury.' [Citations.]" (*Collins, supra,* 26 Cal.4th at pp. 309-310, fn. 4.)

Defendant contends that the holding in *Collins* compels reversal of his conviction. We disagree. The facts in our case are distinguishable from the facts in *Collins* and are more like the facts discussed in *Orin*. The record shows, and the parties agree, that defendant's submission to the trial court of his guilt based on the court's review of the preliminary examination transcript and other documents was, under *Bunnell*, tantamount to a guilty plea. The trial court informed defendant that, in most cases, a defendant who submits the matter on documents is found guilty, and the court gave defendant an indicated sentence of no state prison should the court find defendant guilty after reviewing the submitted documents. The court engaged in no negotiation or bargaining with defendant, the sole purpose of which was to persuade or coerce him into giving up his right to jury trial, and no charges were dismissed or reduced. The prosecutor agreed to waive jury trial and he and defendant agreed as to which documents the court would review for the *Bunnell* submission. Although the prosecutor was not required to consent to the court's indicated sentence, he acknowledged the indicated sentence without stating any objection to it at the time the plea agreement was placed on the record, and he also acknowledged at sentencing that he had agreed to the "plea arrangement." Defendant has not shown that his waiver of jury trial was coerced or invalid, or that he is entitled to reversal of his conviction.

DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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MCADAMS, J.